

December 11, 2003

RECEIVED  
OFFICE OF  
CHILDREN'S ISSUES  
DEC 22 10:11  
BUREAU OF  
CONSULAR AFFAIRS

U.S. Department of State  
CA/OCS/PRI  
Adoption Regulations Docket Room  
SA-29  
2201 C Street, NW  
Washington, DC 20520

Re: State/AR-01/96

To Whom It May Concern:

Enclosed please find two copies of the Hague Confederation's (Confederation) comments on 22 CFR Part 96: Proposed Rule for Accreditation of Agencies and Approval of Persons under the Intercountry Adoption Act Of 2000, for the State Department's consideration in promulgating the final regulations.

The Confederation is comprised of the following adoption policy organizations and membership associations:

Alliance for Children and Families  
Association of Jewish Family and Children's Agencies  
Baptist Adoption Agency Association  
Catholic Charities USA  
Child Welfare League of America  
Committee for International Association of Voluntary Adoption Agencies and NGOs  
Joint Council on International Children's Services  
Lutheran Services in America  
National Council For Adoption  
United Methodist Association

Attached also is a list of the Hague Confederation members with designated organizational representatives and contact information. Should you have any questions or concerns about the enclosed, please contact any of these individuals.

Thank you.

Sincerely,

*The Hague Confederation*

The Hague Confederation

**Comments on 22 CFR Part 96: Proposed Rule for Accreditation of Agencies  
and Approval of Persons under the Intercountry Adoption Act of 2000**

The Hague Confederation (Confederation) submits these comments on 22 CFR Part 96, the proposed implementing regulations of the Intercountry Adoption Act of 2000, for the State Department's (Department) consideration. The following adoption policy organizations and membership associations comprise the Hague Confederation:

Alliance for Children and Families  
Association of Jewish Family and Children's Agencies  
Baptist Adoption Agency Association  
Catholic Charities USA  
Child Welfare League of America  
Committee for International Association of Voluntary Adoption Agencies and  
Joint Council on International Children's Services  
Lutheran Services in America  
National Council For Adoption  
United Methodist Association

RECEIVED  
OFFICE OF  
CHILDREN'S ISSUES  
DEC 22 10 11  
BUREAU OF  
CONSULAR AFFAIRS

1. "Deeming" mechanism (Preamble, page 54,080).

On page 54,080, there is a discussion of the fact that the Department has decided to decline to permit "deeming." Many of the Confederation members are affiliated with adoption providers that are currently accredited by the Council on Accreditation (COA). It is the view of the Confederation, and those adoption providers that have participated in the comment process, that the Department is incorrect in stating that "...its regulatory standards differ substantially from other standards." Speaking for those agencies that have undergone accreditation, including site visits, and that have participated in drafting these comments, it is the Confederation's view that there is significant duplication.

It is the Confederation's recommendation neither to allow "deeming" nor to ignore the fact that a substantial portion of the regulatory standards are included in the COA standards. Rather, we encourage the Department to revise the regulations to provide that, to the extent that regulatory standards of an approved, national accreditor mirror the final regulatory provisions, the accreditor will not be required to review those standards as part of the initial accreditation review process.

The Confederation urges the Department to take into consideration COA's detailed analyses of the extent to which the regulatory standards duplicate COA standards in order to decide which standards COA (or another national, approved accreditor that currently accredits international adoption agencies ("other national accreditor")) need not review. The Confederation recommends further that the extent to which the regulations and standards overlap should be decided in negotiations between the Department and COA (or the Department and any other national accreditor that applies to be a Hague accreditor).

The Confederation advocates for the above approach for several reasons. Federal regulations need not and should not duplicate other regulations. The extra paperwork and approval processes are not in the public interest. First, unnecessary paperwork and approval processes require additional time and utilization of resources by accrediting entities, adding to the cost of the accreditation process. Second, the additional, unnecessary costs will be passed through to those who are adopting, which will not be in the interest of U.S. citizens. Third, adding unnecessary, additional time and expending unnecessary, additional resources will drain accrediting entities and reduce their capacity to complete the accreditation review process for all applicants that apply for accreditation prior to the transitional application deadline, which will delay the date on which the State Department is able to deposit the instrument of ratification at The Hague. Finally, failing to allow for a more narrowly tailored accreditation review process ignores a solution that will assist in minimizing the bottlenecks that will be unavoidable as a result of requiring simultaneous accreditation of all agencies applying for accreditation in advance of the transitional application date.

2. Definitions (96.2, pages 54,093-54,094): Activities that do not require accreditation, approval, or supervision (96.13(a)-(b), pages 54,096-54,097).

The Confederation advocates for the Department to add a definition defining the term "post-adoption services" and further clarify what constitutes a "child welfare services."

First, the Confederation urges the Department to include a definition in 96.2 for "post-adoption services" in order to distinguish the term from post-placement monitoring. Post-placement monitoring is identified as an adoption service. So, also, are those services that are necessary because of a disruption before final adoption. The regulations fail to define "post-adoption services" and "post-placement monitoring," making it impossible to determine precisely of what each activity consists and how they differ from one another. The Confederation proposes the following definition for post-adoption services:

Post-adoption services: Post-adoption services are: supportive services to adoptive families to promote the well-being of adopted persons and families; the stability of adoptive placements; and the prevention of adoption dissolution. Post-adoption services do not include monitoring or reporting after an adoption has taken place, including filing reports that may be required by the country of origin.

Second, the Confederation recommends that the Department add to 96.13(a) a reference to the need for accreditation (or approval) if performing a home study or child background study and providing a child welfare service. This is already stated in 96.13 (b), the subsection that addresses "child welfare services." Adding the comparable reference in 96.13(a), the subsection that addresses "home studies or child background studies," brings greater clarity to 96.13. The Confederation proposes the following language:

(a) "Home studies and child background studies. ...Exempted providers do not have to be accredited, temporarily accredited, approved, or operate as a supervised provider."

If the agency or person provides another adoption service in the case in addition to the home study or child background study, or provides a child welfare service in addition to the home study or child background study, it must be accredited, temporarily accredited, approved, or operate as a supervised provider. ..."

In addition, the Confederation recommends that the Department further clarify what constitutes "child welfare services," taking into consideration that the term child welfare service can be interpreted myriad ways, ranging from a more narrow clinical social service or regulatory definition to a broader definition that could encompass other human services, e.g., an after-school mentoring program. The term is defined in 96.2, in pertinent part, as services that "...include, but are not limited to, recruiting and identifying adoptive parent(s) in cases of disruption (but not assuming custody of the child), arranging or providing temporary foster care for a child in connection with a Convention adoption, or providing educational, social, cultural, medical, psychological assessment, mental health, or other health-related services for a child or family in a Convention adoption case." Greater clarification is important for the reason that, under 96.13(b), and 96.13(a) if the Department accepts the Confederation's above recommendation, the requirement of accreditation or approval is triggered if "performing the home study or child background study" and providing "child welfare services."

Making the above changes would bring greater clarity to the regulations.

3. Access to information and documents requested by the accrediting entity (96.25, page 54,099).

96.25(a) addresses the need of adoption agencies to provide the accrediting entity access to information and documents, including case files, as part of the evaluation process. The regulation is silent on whether the access applies only to case files for Convention countries. The Confederation recommends that the Department revise 96.25(a) to read, in pertinent part, "...including case files in Convention countries." The additional language will reinforce that the Intercountry Adoption Act applies only to adoption services in Convention countries and that an accreditor is limited to reviewing information about Convention-related adoptions in reaching an accreditation decision.

4. Corporate structure: Non-profit tax treatment (96.31 (a), page 54,100).

The Confederation urges the Department to require intercountry adoption providers to qualify for nonprofit tax status under 501(c)(3) of the Internal Revenue Code in order to be a Hague-accredited agency. We recommend that the Department revise the language of 96.31(a) as follows:

(a) "The agency qualifies for nonprofit tax treatment under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, ~~or for non-profit status under the laws of any State.~~"

5. Using Supervised Providers in other Convention countries (96.46, page 54,106): Budget, audit, insurance, and risk assessment requirements (96.33, page 54,100).

96.46 requires that primary providers assume tort, contract, and other civil liability for the foreign supervised provider's delivery of the contracted adoption services. It also requires that primary providers comply with the standards in subpart F and maintain a bond, escrow account, or liability insurance sufficient to cover the associated risks. 96.33 mandates minimum liability insurance of one million per occurrence. These provisions would have a negative impact on a primary provider's ability to deliver adoption services and would significantly increase the costs to adopt a foreign-born child.

The Hague Confederation recognizes the importance of protecting parties to intercountry adoption from negligent or illegal adoption services. However, in the opinion of the Hague Confederation, the liability and insurance provisions for the acts of foreign supervised providers, as currently drafted, will not achieve that goal. For the reasons discussed below, the Hague Confederation recommends that the Department establish a system whereby the federal government make it possible for primary providers to obtain affordable liability insurance. Without such a system, the liability and insurance requirements placed on the primary providers in the proposed regulations are unworkable.

Most problematic is the fact that there are very few carriers that are even willing to write policies that provide coverage for intercountry adoption services. Policies that are presently written often preclude coverage for acts of foreign providers in a variety of ways. For example, these policies exclude from coverage the wrongful acts of persons not employed by the insured. They also make the coverage inapplicable to damages owed due to the assumption of liability in a contract or agreement.

Whether Convention countries will even establish an accrediting and approval system for their agencies and attorneys is uncertain, if not unlikely. As a result, primary providers would have to work strictly with foreign governments, or shoulder an enormous risk of supervising foreign providers and persons. Even if primary providers were able to obtain coverage, the premiums will rise dramatically. The fact that, in the end, there is a right of indemnity will not appreciably address the risk, because insurance carriers would still be required to defend lawsuits and seek indemnity, which will further increase costs for primary providers. These additional costs will be passed on to adoptive parents, driving up the costs of what is already an expensive process.

6. Using Supervised Providers in the United States (96.45, page 54,105): Using Supervised Providers in other Convention countries (96.46, page 54,106): Use of term "supervised" under the proposed regulations as impacted by the term's definition in the Internal Revenue Code, vis-à-vis employees and independent contractors.

The Confederation notes that the proposed regulations, most notably 94.45 and 94.46, use the word "supervised" with regard to those unaccredited adoption agencies or unapproved persons that primary providers use to deliver one or more adoption services as part of a



Convention adoption. The Internal Revenue Code also uses the term "supervised" in the context of distinguishing employees from independent contractors. The Confederation wishes to point out that, under basic legal principles, whether an individual is considered an employee or an independent contractor depends, in part, on the degree of control that the employer exercises over the individual in performance of job tasks. Whether an individual is considered an employee or independent contractor can have ramifications, particularly tax consequences under the Internal Revenue Code. The language of the final regulations ought not prevent an agency or a person from employing independent contractors, i.e., "Supervised Providers" should be treated as independent contractors for federal tax purposes. It is the Confederation's view that since the term "supervised" providers is not mentioned in the Intercountry Adoption Act, some other terminology should be utilized to have the effect intended by the Department. In the alternative, the Confederation suggests that the Department add the following subpart to the end of both sections 96.45 and 96.46: "(e) Nothing in this section shall be construed to alter the distinction between an independent contractor and an employee as recognized for federal tax purposes."

7. Length of accreditation or approval period (96.60 (b), page 54,111).

The Confederation recognizes that it may be necessary as part of the initial accreditation for an accrediting entity to accredit agencies and persons for a period other than four years. It is recommended that the Department specify the applicable selection criteria in the final regulations. The Confederation requests that the Department consider the following in establishing the criteria. To be equitable, the accreditor should take into account the length of the accreditation cycle in setting the accreditation fee, and charge a lower accreditation fee depending on the cycle length, e.g., agencies accredited for three years would be charged a lower fee than those accredited for four (or five) years. Second, there should be provision made for agencies or persons to volunteer for a three-, four-, or five-year accreditation or approval. Third, if the accrediting entity must select agencies or persons to be accredited or approved for three, four, or five years, the accreditor should use a random process.

8. Retention, preservation, and disclosure of adoption records (96.42(a), page 54,104).\*\*

The Confederation encourages the Department to require that adoption agencies retain adoption records a minimum of 75 years, which is consistent with the proposed requirement set forth in 22 CFR Part 98 for Convention records. In the event that state law requires retention of adoption records for a period exceeding 75 years, state law should continue to apply. The Confederation offers the following revised language for 96.42(a):

"The agency or person retains or archives adoption records in a retrievable manner for the period of time required by applicable State law or seventy-five (75) years, whichever is longer."

*\*\*The Joint Council on International Children's Services takes exception to this comment.*

9. Procedures for responding to complaints and improving service delivery (96.41, page 54,104); Suitability of agencies and persons to provide adoption services consistent with the Convention (96.35(b)(5), page 54,101); and Dissemination of information to the public about complaints against accredited agencies and approved persons (96.92, page 54,116).

a) It is the Confederation's opinion that, as drafted, 96.41 will not be effective in carrying out the intent of the regulation, which is to have an available process by which parties to an adoption can raise legitimate concerns about adoption providers. As an initial matter, the Confederation recommends that the Department change the term "complaint" to "grievance" in order to distinguish 96.41, a more formal channel of raising a concern, from an informal expression of general dissatisfaction with services received. (For clarity's sake, the Confederation uses the term "complaint" in the following paragraph, despite the above recommendation.)

The Confederation urges that the Department define "complaint" as part of 96.41. Without a definition, the process will be unworkable for all parties to a Convention adoption: prospective adoptive parents, birthparents, adopted persons, and accredited agencies; and also for the accrediting entities and the Department, both of which have roles in resolving complaints. The lack of a clear definition will afford too much discretion to the accrediting body in evaluating whether the agency has complied with complaint management requirements, e.g., to respond to, document, and report complaints; to the Department should they receive a complaint through the Complaint Registry; and to the adoption agency in deciding what client concerns amount to a complaint, triggering these requirements. By including a definition of what constitutes a complaint, prospective adoptive parents, birthparents, and adopted persons will better understand exactly how to pursue the remedy against an agency; and adoption service providers will be aware what concerns, at a minimum, require follow-up and reporting in accordance with the regulations. (Agencies may choose to prescribe stricter complaint procedures.) In addition, a clear definition will ensure that accrediting bodies and the Department will apply consistent interpretations regarding complaint management for the benefit of adoption agency clients, and to afford the accredited agencies due process.

With the above recommendations in mind, there should be added the following sentence to 96.41:

"A grievance is a written document that is signed by a grievant and addresses an aspect of service delivery governed by the regulations."

The above definition, or a similar one, will ensure that individuals have a right to raise concerns about adoption service delivery and that agencies are able to respond meaningfully. Requiring that "grievances" be in writing and signed by the "grievant" will minimize the number of frivolous complaints. The proposed regulations already provide individuals the right to complain to the accrediting entity and the Department should they feel that the adoption agency did not adhere to the complaint procedures or are dissatisfied with the proposed resolution.

b) 96.35(b)(5) requires agencies to submit to the accrediting entity as part of applying for accreditation "...any written complaint(s) against the agency or person, relating to the provision of adoption-related services, including the basis and disposition of such complaint(s)..." for the prior ten-year period. Without a definition of complaint to guide the agencies in determining what must be included, the regulation is vague and overburdening. The Confederation recommends that the Department define the term complaint in 96.35(b)(5) as including only the following: consumer complaints filed with the licensing or regulatory entity and civil law suits. In combination with the other provisions of subpart (b), accrediting bodies will have sufficient information to determine whether an agency is suitable to provide adoption services under the Convention.

c) 96.92 requires, in part, that accrediting entities (a) verify the receipt, status, and disposition of a complaint upon request of a *member of the public* and (b) have in place procedures for disclosing information about *unsubstantiated* complaints. (Emphasis added.) It is the Confederation's opinion that complaint history disclosure requirements are fundamental to a sound accreditation system. The Confederation encourages the Department to draft a regulation that will enable the public to have up-to-date, accurate information about the quality of an accredited agency's service delivery, all the while balancing this need against an agency's right to due process. For the reasons described below, it is the Confederation's opinion that the current provision is overly broad and should be more narrowly tailored to achieve its intent.

The Confederation believes that requiring agencies to provide information about *unsubstantiated* complaints would be unduly prejudicial, and that disclosure should be limited to those complaints that are *substantiated*. The fact that a complaint is unsubstantiated is an indication that it was unjustified. Similarly, an accrediting entity should be prohibited from disclosing information about the *status* of a complaint to a person or entity *other than* the complainant and the adoption provider against which the complaint is lodged. While a complainant and adoption agency should have a right to know the status and disposition of a complaint, the public should only have the right to information about substantiated complaints. Unsubstantiated information will certainly promote speculation and will often be unfairly prejudicial to an adoption agency. The Confederation thus recommends that the provision be rewritten accordingly. These disclosure requirements, in concert with efficient complaint review processes, will ensure the timely disclosure of information about an adoption agency's complaint history, without promoting a rush to judgment, and will benefit the parties to an adoption.



## Hague Confederation Contact Information

### **Alliance for Children and Families**

Contact: Carmen Delgado Votaw, Senior Vice President of Public Policy  
(202) 393-3570; [cvotaw@alliance1.org](mailto:cvotaw@alliance1.org)

### **Association of Jewish Family and Children's Agencies**

Contact: Bert J. Goldberg, President and CEO  
(800) 634-7346, [bgoldberg@ajfca.org](mailto:bgoldberg@ajfca.org)

### **Baptist Adoption Agency Association**

Contact: Jim Savley, President  
(615) 883-4372, [jsavlev@swa.net](mailto:jsavlev@swa.net)

### **Catholic Charities USA**

Contact: Lisa Smith, Director of Health and Welfare Policy  
703-549-1390, [lsmith@catholiccharitiesusa.org](mailto:lsmith@catholiccharitiesusa.org)

### **Child Welfare League of America**

Contact: Ada White, Director of Adoption Services  
202-638-2952, [awhite@cwla.org](mailto:awhite@cwla.org)

### **Committee for International Association of Voluntary Adoption Agencies & NGOs**

Contacts: William Pierce, President and Executive Director  
202-293-7979, [iavaan@aol.com](mailto:iavaan@aol.com)

Les Megyeri, Legal Advisor  
202-939-8976, [iavaan@aol.com](mailto:iavaan@aol.com)

### **Joint Council on International Children's Services**

Contact: Antonia Edwardson, Executive Director  
703-535-8045, [aedwardson@jcics.org](mailto:aedwardson@jcics.org)

### **Lutheran Services in America**

Contacts: Susan Myers, Director, Lutheran Adoption Network  
[myers.lan@comcast.net](mailto:myers.lan@comcast.net)

Lisa Carr, Director of Public Policy  
(202) 626-7945, [lcarr@lutheranservices.org](mailto:lcarr@lutheranservices.org)

**National Council For Adoption**

Contacts: Thomas C. Atwood, President and CEO  
703-299-6633, [tatwood@adoptioncouncil.org](mailto:tatwood@adoptioncouncil.org)

Virginia Ravenel, Director of Policy and Communications  
703-299-6633, [vravenel@adoptioncouncil.org](mailto:vravenel@adoptioncouncil.org)

**United Methodist Association**

Contact: Kristen Cress, Communications Administrator  
937-227-9494, [kcress@umassociation.org](mailto:kcress@umassociation.org)